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THE SHERMAN ACT AND THE NEW ANTI-TRUST LEGISLATION

I

The recent additions to the federal legislation having to do with monopolies and trusts have followed upon three years of continued and vigorous discussion. In part, very likely, this general revival of interest in the control of the trusts was bound up with the growth of a general radical movement in politics, and more especially with the demand for a generally increased measure of government control of industry. But there is more than mere coincidence in the fact that this period of active public discussion followed immediately upon the decisions of the Supreme Court in the Standard Oil and American Tobacco cases. Before these decisions the Sherman act was a weapon which had never been fairly tested with respect to its efficacy for the purpose for which it was forged. But with its strength and its limitations at least partly uncovered, it became a fair target for criticism.

Not only were the undertakings directly affected by these decisions of great magnitude and with far-reaching affiliations, but, what is more important, each was precisely the sort of undertaking against which the statute was primarily directed. Whether or not labor organizations, railroad combinations, and price agreements affecting a limited area were intended to be covered by the condemnation of the law might afford some ground for debate,

but both the phraseology of the statute and the circumstances attending its enactment place its intent in regard to great industrial combinations beyond the possibility of a doubt. But not until the law had been on the statute books for over twenty years was its efficacy as a weapon against unified industrial consolidations—"trusts" of the modern sort—thoroughly tested in the Supreme Court.[1]

Furthermore, the findings of the court were in themselves such as to renew interest in the statute and stimulate discussion. Especially is this true, of course, of the court's intimation that not all agreements in restraint of trade were prohibited by the statute. Extreme radicals found this state of affairs in itself unsatisfactory. Many others, whether radically minded or not, were disquieted by the opportunity for judicial legislation afforded by the necessity of drawing a line beween legal and illegal combinations. There was also an excusable curiosity on the part of business men as to the legal status of existing business arrangements, including not only overt combinations but also a mass of secret trade agreements which would, in part at least, be brought to light if their legality were assured. And a similar interest attached to the possibility of introducing trade agreements into new and supposedly forbidden fields.

Along with this curiosity as to the exact extent of the field for business combination left unguarded by the apparently shrinking statutory barriers, there was an increased amount of apprehension and disquietude, especially on the part of the larger business combinations. For even if the law itself had been somewhat softened, its administration had been unprecedently vigorous. There have been not a few attempts to show that the vigor and pertinacity with which the law has been enforced have varied with the policies of different presidential administrations. Since the enactment of the law there has been a rapid but fairly steady increase in the

[1] The E. C. Knight Co. (Sugar Trust) case does not constitute a real exception to this statement, because of the narrow issue on which the decision of that case turned. None of the other so-called "trusts" involved in cases which reached the Supreme Court were more than combinations of independent undertakings held together by price agreements, pooling arrangements, or the employment of a common sales agent.

number of prosecutions and a yet more notable increase in the number of successful prosecutions. Nevertheless it would be going too far to attribute all of the difference to the relative apathy of the earlier administrations. The earlier decisions, especially in the cases of *In re Greene*[1] and *United States* v. *E. C. Knight Co.*,[2] were discouraging, and the development of adequate administrative machinery has been of necessity a slow process. At any rate, it is evident that the work of the public prosecutor in recent years has been carried on under more advantageous circumstances than it was twenty or ten years earlier. The successive decisions under the statute have indicated what are likely to be the more vulnerable aspects of the combinations attacked; mistakes and deficiencies in the preparation of some of the earlier cases have naturally been guarded against in the later. Moreover, whether or not a given combination falls under the condemnation of the statute is a matter of fact as well as of law, and the Department of Justice is much better equipped than formerly for uncovering the complex and frequently hidden facts in the case. Not until 1903[3] was the immunity of witnesses from prosecution on account of matters testified to, which had been granted in 1893 so far as proceedings under the Interstate Commerce act were concerned, extended to witnesses in proceedings under the Anti-trust act. The establishment of the Bureau of Corporations in 1903 and the organization of the Bureau of Investigation in the Department of Justice in 1908[4] made available a permanent staff of expert investigators. Not only have these bureaus been signally useful in the collection of evidence for the prosecution, but, what is quite as important, their investigations have indicated in advance whether a proposed prosecution under the statute might be undertaken with any hope of success.[5] The government has been better equipped in recent years for the efficient enforcement of the Sherman law than ever before.

[1] 52 Fed. 104. [2] 156 U.S. 1.

[3] 32 U.S. Stat. 854. Mention should also be made of the acts of 1903 and 1910 to expedite hearings under the Sherman law (32 U.S. Stat. 823; 36 U.S. Stat. 854).

[4] *Report of the Attorney-General*, 1909, p. 8.

[5] *Ibid.*, 1910, pp. 2, 3, 26.

But it would not be fair to attribute all or even a major part of the recent interest in the amendment of the Sherman act to whatever dissatisfaction, uncertainty, and unrest were created by the interpretation and administration of the statute. There were indications that legislators and publicists had a more adequate appreciation of the real nature of the problems involved in the growth of industrial combinations than was the case twenty years before. That the Sherman law had apparently had but little effect in checking the movement toward industrial combination was in itself a fact demanding explanation and compelling, in a manner, a recognition of the complexity of the problem and the possibility of other ways of dealing with it.

Furthermore, it is significant that in much of the more serious discussion, both the analysis of the problem and the proposals of specific remedies involved the recognition of certain principles that for some years had been very generally accepted among economists. Specific instances of the direct influence of economic writing and teaching have not been lacking,[1] and it is fair to infer that through a process of gradual diffusion the indirect influence has been considerable.

There seems to have been a very general impression that the decisions in the Oil and Tobacco cases declared a new judicial policy in the application of the Anti-trust act; that "good trusts" were to be distinguished from "bad trusts"; that combinations might restrain trade providing they did not "unduly" restrain it; that possibly even price agreements were permissible, if the prices agreed upon were "reasonable." Much has been written upon these points, but because the significance of the recent supplementary legislation hinges in part upon the real bearing of these decisions, I think it worth while to review the matter again.

If the decisions in question are to be taken at their face value, the general impression that they opened the way for "reasonable"

[1] Although there are many who might be mentioned, special reference should be made to the influence of (1) Professor R. T. Ely's early and continued insistence upon the fact that mere size does not give sufficient advantage to be the basis of a lasting monopoly, and that where there is such monopoly there must be some definite source of monopoly power, and (2) Professor J. B. Clark's thesis that the only power for evil possessed by most of the trusts was the power of predatory competition.

price agreements and mildly repressive contracts and combinations in restraint of trade does not seem to have been well founded. The precedents from which in particular the new holdings were supposed to mark a departure are the decisions in the Trans-Missouri Freight Association and Joint Traffic Association cases. In these cases it was held in general terms that the Sherman law, referring as it does to "every" contract, etc., in restraint of trade, prohibits contracts and combinations in restraint of trade whether reasonable or not. The minority opinion in the Trans-Missouri case, written by the present Chief Justice and concurred in by three other justices, held that the phrase "restraint of trade" should be given its common-law meaning, under which not all contracts limiting the freedom of trade are deemed invalid as involving "restraint of trade."

But the issue as between the majority and minority opinions does not seem to have been squarely joined. It has been very generally overlooked that it was intimated in the majority holding in the Trans-Missouri case and plainly stated in the Joint Traffic case that certain kinds of contracts which involve in fact some restraint of trade but are not invalid under common law would not he held illegal under the statute.[1] From this it would appear that so far as the general statement of the principles of the law is concerned the division of the court was more apparent than real. But there was, however, some fundamental ground of disagreement, even if not clearly expressed, for these supposedly conflicting interpretations of the law were not offered as mere *dicta*, but in support of opposing opinions as to the legality of the particular combinations under consideration.

The specific question involved was whether a combination of railroads for the purpose of fixing and maintaining rates fell under the condemnation of the statute, if the rates fixed by the agreement were not shown to be in themselves unreasonable. In the dissenting opinion it was claimed, first, that such agreements among railroads were necessary and even desirable, hence not unreasonable and consequently not illegal, and, second, that the Sherman act was not intended to apply to railroads. The majority

[1] 166 U.S. 329; 171 U.S. 567.

of the court held, however, that neither of these contentions could be sustained in the face of the fact that the Sherman act condemns *every* combination in restraint of trade. The real ground of difference, I think, is to be found in the fact that, although both the majority and the minority of the court were agreed that some agreements which restrain trade are not condemned by the statute, they did not agree as to the general logical basis of such exceptions. The dissenting opinion held that "reasonableness" in the sense, apparently, of an absence of harmful economic or social effects is the ground on which exceptions should be made, while the majority of the court held (more clearly in the Joint Traffic case) that every agreement is illegal if its direct purpose is restraint of trade, while it may be legal if the restraint of trade is merely incidental to a contract made primarily for another and legitimate purpose, providing that the restraint of trade is no greater than is necessary to the protection of the legitimate purpose of the contract.[1] Both the majority and minority opinions claimed to be in harmony with common-law precedents. But this last is a matter too large for present discussion, and does not fall within the competence of the present writer.[2]

What the Trans-Missouri and Joint Traffic decisions virtually resolve themselves into is this: Certain classes, forms, or kinds of agreements, such as a partnership or an ordinary corporation formed by the union of former competitors, or the sale of the good-will of a business on terms by which the seller agrees not to compete with the buyer, may "restrain trade," but because the main purpose of such combinations or contracts is legitimate, and the restraint of trade is only incidental, they will not be considered as restraints of trade under the statute. But where the *direct purpose* of a combination or contract is restraint of trade it will be deemed illegal even if the restraint is reasonable in the sense that

[1] 171 U.S. 567, 568. Cf. *Hopkins* v. *United States*, 171 U.S. 592–94.

[2] The majority opinion seems to be in harmony with the frequently cited summary of common-law precedents by Judge Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 281, 282. In general harmony with the dissenting opinion is Mr. Bruce Wyman's thesis that the public interest rather than the hard-and-fast rule of the maintenance of competition is the ultimate criterion by which the common law tests the validity of contracts in restraint of trade. Cf. his *Control of the Market*, especially chap. vi.

it is not prejudicial to the public interest. The things thus distinguished have come to be known as "direct restraint" and "indirect restraint."

The court did not differentiate the meaning of "restraint of trade" in the statute from its common-law meaning by bringing under the inhibition of the statute any of the general classes or kinds of contracts or combinations which were valid under common law. But it did refuse to give to the statute the elasticity which the dissenting opinion held was to be found in the common law. By the statute Congress had, in the view of the court, established unrestricted competition as the declared public policy in such matters, and it was for Congress, not the court, to relax the rule if its rigid application were found to be undesirable. In short, all combinations and contracts entered into with the direct purpose of restricting competition in interstate commerce were held to be illegal, although it was still held, as in earlier cases, that agreements which "indirectly and remotely" affect interstate commerce were not covered by the act.

The doctrine thus established was followed in the Northern Securities case[1] and in a number of cases decided in the inferior courts.[2] In none of these subsequent cases, however, with the possible exception of the Northern Securities case, is there any clear indication in the decisions that the findings would have been for the defendants had it not been for the Trans-Missouri precedent. The rule established in that case may have simply afforded the courts a convenient means of narrowing the issues in subsequent cases, by ruling out at once the defense of reasonableness.

On the other hand, however, before the Trans-Missouri decision the lower courts had refused to apply the Sherman act to a number of combinations which clearly restrained trade in ways more direct than were indicated as permissible in the Trans-Missouri case. Certain price agreements, for example, were declared legal.[3] After

[1] 193 U.S. 331.

[2] Representative cases are: *United States* v. *Coal Dealers' Association*, 85 Fed. 252; *United States* v. *Swift & Co.*, 122 Fed. 529; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454; *Phillips* v. *Iola Portland Cement Co.*, 125 Fed. 593.

[3] *United States* v. *Nelson*, 52 Fed. 646; *Dueber Watch-Case Manufacturing Co.* v. *E. Howard Watch & Clock Co.*, 66 Fed. 637.

the Trans-Missouri decision, agreements somewhat similar to these were declared unlawful.[1] It is fair to infer that the Trans-Missouri decision distinctly widened the actual field of application of the statute so as to include, moreover, cases involving particular issues quite distinct from those of the leading case.

Turning now to the Standard Oil and American Tobacco cases, does there appear any clear evidence that the court's expressed intent to interpret the statute "in the light of reason" meant that the range of its applicability would be again restricted? No definite answer to this question can be given, of course, except in the light of subsequent decisions in border-line cases. The dictum in the Oil case, embodying in general terms the court's interpretation of the act, does not afford a satisfactory basis of inference.

Taking the decision at its face value, however, it does not seem to come to quite the same thing as the minority opinion in the Trans-Missouri case, although both were written by the present Chief Justice. In that dissenting opinion it was held without equivocation that only "unreasonable" contracts in restraint of trade were condemned by the statute, and it was urged that to construe the statute as excluding certain classes of contracts, such as those which are collateral to a sale of property, while at the same time stating that the statute covers every contract in restraint of trade, was illogical. Had this minority opinion prevailed, it would have given to the statute all the elasticity that could by the broadest interpretation be found in the common law. The courts would have been free to pronounce upon the legality of particular kinds of combinations according to their view of public policy. The determination of public policy would have been influenced, of course, by precedents, but many modern forms of combinations are too new, and precedents consequently too uncertain to have given necessarily and immediately any hard-and-fast rule of discrimination between permissible and illegal combinations. For better or worse, the road to judicial legislation would have been opened.

The Standard Oil decision did not explicitly state that only unreasonable contracts in restraint of trade were condemned by the

[1] *Ellis* v. *Inman, Poulsen & Co.*, 131 Fed. 182; *Loder* v. *Jayne*, 142 Fed. 1010; *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 164 Fed. 803; 220 U.S. 373.

law. Its emphasis was on the thesis that the statute must be interpreted "in the light of reason," and that the "rule of reason" must be applied in determining whether a particular combination is within the scope of the law's condemnation. It is true that "undue" restraint of trade was specified as the thing prohibited, but the stress was not put on this point. There is nothing in the decision really inconsistent with the minority opinion in the Trans-Missouri case, but it went farther than that holding, in that it *identified restraint of trade with monopoly.*

It was pointed out that with the gradual narrowing of the older common-law definition of restraint of trade as any voluntary restraint put by an individual on his right to carry on his trade, and the accompanying broadening of the original technical meaning of monopoly so as to include engrossing, the two concepts restraint of trade and monopoly came to be blended. Interpreting the statute, then, as using common-law phrases with a common-law meaning, it was held that its first section, declaring contracts, combinations, and conspiracies in restraint of trade illegal, and its second section, making it illegal to monopolize or to attempt to monopolize any part of interstate trade or commerce, are mutually explanatory. "Undoubtedly," said the court, "the words 'to monopolize' and 'to attempt to monopolize' as used in the section reach every act bringing about the prohibited results."

If this joining of the first two sections of the act could be accepted as final, the definition of the word "monopolize" would be the only serious difficulty in the interpretation of the statute. The courts would be left free to determine whether a given restraint of trade is against public policy, but the standard by which public policy should be gauged would be definitely prescribed. In certain respects, at least, this hypothetical result may be taken as a description of the actual state of law. The particular form which a combination adopts counts for nothing either one way or the other. Its purpose and the methods used in attaining its purpose are the crucial facts. If "judicial legislation" means the determination of public policy in particular instances by the courts, the Standard Oil decision did not give it much scope.

And yet this is not all there is to the matter. There are important classes of cases to which the Sherman act has been held and is

still held to apply in which the presence or absence of monopoly or of monopolistic intent is not the determining factor. In other words, under the accepted interpretation of the statute, there may be "restraint of trade" where there is no "restraint of competition." Most of these cases have to do with interference with commerce on the part of labor unions.

In the Sherman act the common-law phrase "restraint of trade" became "restraint of trade or commerce among the several states, or with foreign nations." This and the fact that the act rests upon the federal power over interstate commerce have given a decided twist to its interpretation. The contracts in restraint of trade found in the early common-law cases were agreements by which an individual bound himself to refrain from pursuing a specified calling, and the evils involved were supposed to reside in the partial loss of the power of supporting one's self and of contributing to the welfare of the community. Later, agreements tending to limit or suppress competition as an efficient price-fixing force were also classed as contracts or combinations in restraint of trade. But, so far as I can find, the effect of such agreements upon the volume of commerce was never made the factor determining their illegality.

In one of the early cases under the Sherman act[1] it was held by the Circuit Court for the District of Massachusetts that the words "commerce" and "trade," as used in the statute, are synonymous:

> Careless or inapt construction of the statute . . . . will, if followed out logically, extend into very large fields, because . . . . the inevitable result will be that the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by every method of interference by way of violence or intimidation. It is not to be presumed that Congress intended thus to extend the jurisdiction of the courts of the United States without very clear language.[2]

But within a month another circuit court had granted an injunction against a combination of striking working-men on the ground that in refusing to work they were violating the statute by interfering with the movement of goods in interstate commerce.[3] The opinions

[1] *United States* v. *Patterson*, 55 Fed. 605. [2] 55 Fed. 641.

[3] *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. 994.

in the cases arising out of the railway strike of 1894 contain explicit recognitions of their departure from common-law precedents. Thus, "The term 'restraint of commerce' was used in its ordinary, business understanding and acceptation."[1] Another statement is:

> I am unable to regard the word "commerce," in this statute, as synonymous with "trade" as used in the common-law phrase "restraint of trade." In its general sense, trade comprehends every species of exchange or dealing, but its chief use is "to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail," and it is so used in the phrase mentioned. But "commerce" is a broader term . . . . and, as used in this statute, ... should not be given a meaning more restricted than it has in the Constitution.[2]

Even more specific is the following:

> The primary object of the statute was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another.[3]

For present purposes it is immaterial whether the logic of these opinions is sound, or whether the Sherman act was seized upon and distorted somewhat in order to meet a great emergency.[4] But even if these interpretations of the scope of the act were not illogical, it cannot be held that they were in any sense necessary. Whether the statute was intended to apply to labor combinations may be a matter of doubt, but there is no evidence in the congressional debates that it was anticipated that the statute would prohibit interference with commerce as a thing distinct from restraint of trade. Of course these decisions make much of the use of the term "conspiracy" in the statute, but even if that word means in this

[1] *United States* v. *Elliott*, 64 Fed. 30.

[2] *United States* v. *Debs*, 64 Fed. 749.

[3] *United States* v. *Cassidy*, 67 Fed. 705.

[4] There may be some significance in the fact that the Supreme Court, in the only one of these cases which reached it (*In re Debs*, 158 U.S. 564), did not rest its findings upon the Sherman act, but on the general federal powers over interstate commerce and the transmission of the mails. But its subsequent opinions have been such as virtually to imply an approval of the broad scope given to the Sherman act by the lower courts in the railroad strike cases.

connection anything more than "combination,"[1] the decisions nevertheless really hinge upon the meaning attached to the word "commerce."

Similar in some respects are the decisions of the Supreme Court in two cases that should be sharply differentiated from most of the cases under the statute that have come before that body. In *Loewe* v. *Lawlor*[2] a boycott instituted by the Danbury Hatters' Union was held to constitute a conspiracy in restraint of interstate commerce. It was immaterial, said the court, that there was no suppression of competition, and it was even immaterial that there was no direct physical obstruction to the movement of commerce. It was sufficient that the boycott tended to check the free flow of goods from one state to another. In the recent case of *Eastern State Lumber Association* v. *United States*[3] an arrangement by which the members of an association of retail lumber dealers were informed of the names of wholesale dealers who sold directly to consumers was held to be a similar restraint upon the movement of interstate commerce, although no suppression of competition was alleged.

Doubtless in many jurisdictions the actions condemned in these two cases would have been held to be offenses under the common law, but not because they "restrained trade" and certainly not because they interfered in any way with the general movement of commerce.

The fact seems to be that the Sherman act is held to apply to two very different classes of things. Interference with the movement of commerce is one thing, and suppression of competition is

[1] Justice Holmes held in his dissenting opinion in the Northern Securities case (193 U.S. 403) that "the words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade." Cf. *Rice* v. *Standard Oil Co.*, 134 Fed. 464. This point is reviewed in *Tribolt* v. *United States*, 11 Ariz. 436; 95 Pacif. 85.

[2] 208 U.S. 274.

[3] 234 U.S. 600. The older case of *Montague & Co.* v. *Lowry*, 193 U.S. 38, turned partly upon similar considerations, although in that case the element of monopoly was not entirely absent. And in *United States* v. *Patten*, 226 U.S. 541, the court said: "Sec. 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraint, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein."

quite another thing. In point here is the extraordinary decision of the Circuit Court of Appeals in *Whitwell* v. *Continental Tobacco Co.*,[1] which held that under a correct interpretation of the second section of the act "no attempt to monopolize a part of commerce among the states is made illegal or punishable unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states." Probably this decision (which refused to see in an attempt to monopolize by the use of a factor's agreement of the most flagrant sort any evidence of the violation of the act) would not now be accepted as good law. But it draws a sound distinction between the suppression of competition and the hindering of the movement of commerce. Few economists would care to maintain that competition would always have the advantage over monopoly in respect to the volume of commerce it would create. It seems then that, despite the language of the Standard Oil decision, the identification of "restraint of trade" and "monopolizing" or "attempting to monopolize" is not complete. The Sherman act, as at present interpreted, condemns two very different sorts of offenses.

The Sherman act is a general statute, declaratory of public policy. As such it must be judged, it seems to me, by (1) the soundness of the public policy which it declares, (2) the accuracy and completeness with which it declares that public policy, and (3) the adequacy of the mechanism which it provides for making that public policy effective. What more I have to say in this first paper will have to do with these three aspects of the statute.

1. There can be little doubt but that the public policy which the act was intended to embody is that competition should be maintained, artificial monopoly destroyed, and its growth prevented. In the congressional debates attending its enactment the great industrial combinations of the day were singled out by name as the things against which it was directed. And it is clear from the debates that the hostility toward these industrial combinations was especially directed against (1) their supposed power over prices and (2) their aggressive suppression of competition. Whatever the economic advantages of monopoly *per se* may be, there will be little

[1] 125 Fed. 454.

question of the soundness of the policy which would attempt to deprive it of its power for evil in these two particulars.[1]

But it is often urged that to attempt to maintain competition by prohibiting attempts to monopolize is illogical, since monopoly is the goal of competition, and achieved monopoly is merely the result of thoroughly successful competition.[2] The aim of each competitor is to aggrandize his own business at the expense of his rivals, and just so far as he leaves his rivals in partial possession of the field he falls short of complete success. The simplicity of this reasoning makes it attractive, but it is too simple to fit the facts of the case. We need not discuss at this point the pertinent question as to whether a permanent industrial monopoly can be achieved by the use of permissible competitive methods by a business not enjoying any special advantages not open to its competitors aside from the possession of a larger amount of capital, for the matter can be disposed of in a simpler fashion. There is a substantial difference between competing and "attempting to monopolize" in purpose and consequently in methods. The ordinary competitor, it will be conceded, does not have the establishment of monopoly in mind

[1] Most of the more weighty discussions of the economic advantages of monopoly have to do with the effect of monopoly upon the aggregate production of wealth measured in terms either of subjective satisfaction or of objective commodity units. Even from this point of view the case for monopoly is exceedingly dubious and, at best, has a validity that is restricted and conditioned in many ways. Moreover, such considerations are relatively unimportant compared with matters like the effect of monopoly upon distribution, upon the scope for individual initiative, upon economic opportunity in general, and upon a host of social and political relations. In short, it is a question less of the relative "economy" of monopoly or competition than of the kind of economic organization best calculated to give us the kind of society we want. Until our general social ideals are radically changed, it will take more than economic analysis to prove that it would be sound public policy to permit monopoly in that part of the industrial field where competition is possible.

[2] Such was the opinion of a number of witnesses before the Senate Committee on Interstate Commerce, 62d Congress. See for example the Hearings pursuant to Sen. Res. 98, pp. 1431 ff. The latest of the very few expressions of similar views by economists is to be found in Professor R. L. Liefmann's article entitled "Monopoly or Competition as the Basis of a Government Trust Policy," *Quarterly Journal of Economics*, XXIX, 308 (February, 1915). For a judicial opinion to the same effect, see *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 462, where it was even held that "every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation." In general, however, this misuse of the word "monopolize" has no better standing in law than it has in economics.

as an end. He strives to increase his profits by increasing his trade, and in so doing he usually endeavors to acquire as much as he can of the custom enjoyed by his competitors. But the thing directly sought is such increase of his profits as is possible under competitive conditions. The effect of his policies on his competitors is secondary and, generally speaking, indirect. The phrase "attempting to monopolize" on the other hand is meaningless if it does not refer to conscious efforts to get rid of the limitations which competition sets upon one's ability to buy and sell at such prices and on such terms as one pleases. The elimination of competition through the absorption or crippling of competing establishments becomes the direct and primary object, and the methods used are adapted to this end. The contention that "to compete" and "to attempt to monopolize" are synonymous is clearly unsound. They are definitely antagonistic in principle.

2. Is the Sherman act an accurate expression of the public policy which it seeks to declare? If by accuracy is meant precision, it has little of it. It was, in its inception, a lawyer's statute, speaking in the language of the common law. It was drafted by the Judiciary Committee of the Senate as a substitute for the Sherman bill, which, together with a mass of proposed amendments, had been referred to that committee. These amendments included various lists of particular offenses and various delimitations of the precise field of application. It was evident that it would be difficult for Congress to come to an agreement on any one set of particularizations. Moreover, the general phrases of the Sherman act were chosen intentionally, we are told by one of its framers, in order that the responsibility of determining its exact scope might be left to the courts.[1] For seven years its interpretation was uncertain. The decisions in the lower courts were conflicting, and the Supreme Court's holdings purely negative. Nor did the Trans-Missouri decision help matters much. The words "restraint of trade" still remained to be defined, and in the next thirteen years the work of definition progressed only so far as the

[1] George F. Edmunds, "The Interstate Trust and Commerce Act of 1890," *North American Review*, CXCIV, 801 (December, 1911). Cf. A. H. Walker, *History of the Sherman Law*, chap. i, ii; and O. W. Knauth, *The Policy of the United States towards Industrial Monopoly*, chap. i.

particular cases decided were typical of classes of possible cases. The standard of public policy announced in the Standard Oil decision was the first general criterion of the scope of the act. There is nothing in subsequent decisions which indicates any tendency on the part of the court to depart from that standard.

With restraint of trade held to be the general equivalent of monopolizing and attempting to monopolize, there is small doubt that the present interpretation of the statute is in harmony with the purposes which were in mind at the time of its enactment. The great industrial combinations against which it was hoped that the statute would be efficacious have for the most part a more thoroughly unified and compact form than they had in 1890. Whether such consolidations are contracts, combinations, or conspiracies in restraint of trade within the meaning of the common-law terms may be a matter of doubt.[1] But there is now no question that, if their purpose is monopoly, they come within the condemnation of the Sherman act. Nor does it appear that in any unimportant respects the statute has been weakened. There is no reason to think, for example, that price agreements and agreements to restrict output, whether of local or of general scope, are not as illegal now as they have been at any time.[2]

As a general expression of the public policy which it is supposed to embody, the Sherman act is adequate. The difficulty is that it goes too far. In the first place, as we have already seen, it is so worded that it is used as a weapon against strikes, boycotts, and other concerted efforts to interfere with the conduct of any business

[1] Cf. the argument of Justice Holmes to the effect that under the common law contracts in restraint of trade are contracts with strangers to the contractor's business, and that combinations and conspiracies in restraint of trade have the purpose of keeping strangers to the agreements out of business. (*Northern Securities Co.* v. *United States*, 193 U.S. 404, 410.)

[2] The following extract from the opinion of the Circuit Court in the "bath-tub trust" case is directly in point: "Some men believe that price agreements should be sustained by the courts, unless they are shown to be against the public interest. Others hold that they may be permitted only when it is affirmatively shown that they promote the public interest. Still others say that a price agreement pure and simple is always illegal. That the Supreme Court has declared the last of the above-stated contentions to be the law is conclusive here."—*United States* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 182. See also the decision of the Supreme Court in the same case, 226 U.S. 20, and *Straus and Straus* v. *American Publishers' Association*, 231 U.S. 222.

undertaking which ships its goods across state lines or to other countries. These things may be undesirable; very likely some of them are. But they are so far out of line with the other things condemned by the Sherman act, and in most instances have so little relation to "monopolizing," that the Sherman act ought to be so amended as to cut them out of the list of offenses which it condemns.[1] In some cases they clearly run counter to current conceptions of public policy. In other cases this is not so clear. At any rate, if federal law is still to condemn all or some of these things it should take the form of separate and carefully drawn statutes. Moreover, practices like those condemned in the Eastern States Lumber Association case, mentioned above, probably fall within the jurisdiction of the new Federal Trade Commission.

In the second place, the application of the Sherman act to railroads is inconsistent with the standards of public policy embodied in the Interstate Commerce act. We regulate railroad rates and services on the assumption that railroads are natural monopolies, and that combinations or rate agreements are inevitable. But at the same time we condemn railroad combinations and rate agreements, and (as in the New Haven case) bring criminal indictments against the men responsible for such combinations.[2] From railroads we exact the observance of two mutually inconsistent standards of morality. The real evils in railroad combinations are matters of corporation finance and of the equilibrium of the equities of various sorts of bondholders and stockholders. These evils should be dealt with by statutes appropriate to the purpose, and the Sherman act should be so amended as to be relegated to its proper field of preventable industrial "monopolizing."

Finally, there comes the question of whether even within the industrial field we want to prohibit monopoly as well as aggressive monopolizing. Probably a monopoly achieved merely by the superior efficacy of a formerly competitive business unit (if such

[1] This could be done by omitting the word "or commerce" from the first three sections of the act. Or if this should be thought to raise a doubt as to the statute's constitutionality, the words "in restraint of trade or commerce" might be changed to read "in restraint of competition in commerce."

[2] This, of course, has nothing to do with the questions relating to the way in which the New Haven officers and directors discharged their trusteeship for the stockholders of that road.

a thing were possible) would not be condemned by the courts as a violation of the Sherman act. Monopolies achieved by the active suppression of competition are so condemned. What, then, is the status of a monopoly built up merely by the peaceful union or absorption of competitive units? Such combinations in the railroad field have already been condemned in the Northern Securities and Union Pacific cases. Should similar combinations in the industrial field likewise be broken up, or (since unfair methods are ruled out) should we put our trust in latent competition? This seems to have been in essentials the problem that was put before the District Court in the International Harvester Company case,[1] in which the decision was that the combination was condemned by the statute.[2] The decision of the Supreme Court in this case will do much to fix the boundaries of the region to which the act applies. On which side public policy properly lies is hard to determine. On grounds of economic principle there is nothing to fear from such combinations. But on the other hand there is not much to gain from them, and in practice it would prove hard to draw a line between peaceful combination and predatory combination for monopoly's sake. Probably little harm would be done, and possibly some good, if no such line were drawn except to mark off one combination as illegal even in the early stages of the monopolizing process, and the other as legal except when combination has reached the full measure of monopoly.

3. Does the Sherman act provide an efficient mechanism for achieving its own ends? That its criminal features have been relatively ineffective is generally admitted. In many cases these criminal remedies could not have been enforced except at the expense of the efficiency of the proceedings for the dissolution of the combination. Furthermore, it has been found in practice that it is a very difficult thing to secure a criminal conviction from a jury for an offense so general, so abstract, so little tainted with a general and customary imputation of immorality as "restraint of trade" or "monopolizing." It is often said that "restraint of trade" is no more indefinite than "fraud." This is very likely so, but there

[1] 214 Fed. 987.

[2] This decision is criticized by Clarence E. Eldridge, "A New Interpretation of the Sherman Act," *Michigan Law Review*, November, December, 1914.

is the essential difference that fraud consists in, or is accompanied by, simple and concrete actions, while restraint of trade is, as I have suggested, general and abstract. It is significant that the few convictions obtained under the Sherman act have been in cases where the restraint of trade or of commerce consisted in, or was evidenced by, specific and objectionable acts. There is no reason to expect that it will ever be easy to secure convictions for restraint of trade or monopolizing in cases where the separate steps taken in the creation of the restraint are unobjectionable except as part of the general scheme. As it is, the statute provides merely an indirect and uncertain way of penalizing unfair competitive methods.[1] I see no reason why the criminal remedies of the Sherman act should be retained.

The proceedings in equity for the dissolution of a combination have, on the contrary, proved to be increasingly effective, in the sense that they have resulted in an increasing number of successful prosecutions. It is contended by many that the enforced dissolution of a combination means generally a mere change in form without diminution in monopoly power; that we are merely hunting the quarry from tree to tree. But in neither transportation nor industry does it clearly appear that the newer and more unified forms of consolidation would not have largely displaced the old, even if the movement had not been hastened by legislation and by decisions under the common law. Among other things tending to this end the various strategic advantages of the consolidated unit, the permanency and dependability of the newer forms of combinations, making possible the adoption of business policies based on long-time considerations, and the opportunities the single corporation, whether holding company or not, affords for the capitalization of promoters' profits may be mentioned.

But even if the Sherman act has itself been partly responsible for the change in the form of combinations (it cannot have increased their number), it does not follow that in the future its history is to repeat itself in this particular. It may be that, after a long chase, the quarry has finally been driven into a corner.

Granting all this, is it proved that the mere dissolution of industrial combinations accomplishes anything, especially in cases where

[1] Neglecting its anomalous application to strikes and boycotts.

the equities in the combination are made the basis of a pro rata distribution of the equities in its constituent parts? I cannot attempt here to answer so large a question. But I may suggest a few general conclusions: (1) The results must vary with the nature of the business and the degree to which the aggressive suppression of competition played a part in maintaining monopoly conditions. The results must also vary with the degree to which railway rates and other distributive conditions had been shaped for the benefit of the combination. (2) Dissolution rarely comes early enough—not until the monopolistic situation (if any exists) has become more or less crystallized. This suggests the need of emphasis upon methods rather than achieved results, upon monopolizing rather than upon monopoly. (3) The operation of the statute is intermittent. Dissolution should be carefully followed up, and every step in the process of restoring normal conditions should be carefully watched. This requires administrative machinery. (4) The Sherman act needs supplementing. At certain points, at least, this is accomplished in the new anti-trust legislation which will be considered in a subsequent paper.

But in its own field the Sherman act has a value all its own. No matter how carefully drawn the rules of the game may be, no matter how high the level set by the law for competition, new business situations, new conditions are bound to arise, not covered by specific statutes, and yet contrary to the generally accepted public policy of the maintenance of competition within its own proper field. The Sherman law, as a general declaration of public policy, has an elasticity and adaptability to new situations of all kinds not possible to legislation of a more specific sort. Its declaration of public policy is general enough so that it may gradually grow in meaning and change in application through judicial decision as the common law has grown and changed. So long as the preservation of competition in that large part of the industrial field in which it is feasible is public policy, why should we not, through such a statute, continue to give to the federal courts jurisdiction in cases involving the assertion of that public policy? But, it needs amendment in the ways which have been indicated.

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